



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 21 OF 2015

BETWEEN

MARY KITSAO NGOWA & 36 OTHERSAPPELLANTS

AND

KRYSTALLINE

LIMITED.....RESPONDENT

**(An appeal from the judgment and decree of the Industrial Court of Kenya at Mombasa,
(Makau, J.) dated 31st October, 2014**

in

Ind. Court Cause No. 78 of 2014)

JUDGMENT OF THE COURT

The appellants are former employees of the respondent, having been engaged in various capacities and on diverse dates between the years 1998 and 2013. Their designation was to work in the respondent's salt tapping and packaging section. However, in 2013, following the introduction of machines by the respondent, according to the appellants, it declared them redundant.

Aggrieved by this development, the appellants lodged a claim in the Industrial Court at Mombasa, now the Employment and Labour Relations Court, contending that the said termination was wrongful as throughout their employment, the respondent had underpaid them, refused to pay house allowance, annual leave, overtime and in any event failed to comply with the law on redundancy when terminating their said employment. As a result, the appellants sought a plethora of orders as follows:-

- a. One month's pay in lieu of notice;
- b. Damages at 12 months gross pay for wrongful dismissal under Section 48(c) of the Employment Act;
- c. Unpaid house allowance as per Section 31 of the Employment Act, at 15% of the basic minimum wage

- d. Payment in lieu of annual leave;
- e. Overtime pay;
- f. Severance pay at three (3) month's pay for each completed year;
- g. Outstanding wages dues to the underpayments as per the provisions of the Labour Institutions Act Section 63(1) and Regulation of Wages (General) Order LN 120/1982, LN 80/1985, LN 17/1987, LN 97/1987, LN 122/1987, LN 189/1989, LN 207/1980;
- h. Pay for public holidays and rest days worked; and
- i. Issuance of certificates of service

Coupled with the above were prayers for interest on all the sums to be awarded and costs for the claim.

In its defence, the respondent averred that the appellants were casual labourers and piece rate workers, who were neither dismissed nor declared redundant, but who rather, left employment on their own volition after they failed to force the respondent's hand to abandon the replacement of their services by machines and an increase in the casual pay. They were thus not entitled to any of their claims above.

The claim was heard by **Makau, J.** who in a judgment delivered on 31st October, 2014 found in favour of the appellants in part. He held that the dismissal of the appellants was unfair; that though the intention of the respondent was to lay off the appellants, the respondent had failed to follow the laid down procedure on redundancy and this made the termination of the appellants' employment unlawful. In this regard, the learned Judge awarded the appellants a total sum of Kshs.2,067,557/- plus costs and interest.

This sum was in respect of accrued annual leave, pay in lieu of notice, damages for wrongful dismissal and underpayment of wages spanning the entire duration of their respective engagements with the respondent. However, the learned Judge was of the view that some of the claims were time barred by virtue of **Section 90** of the Employment Act which prescribes a limitation period of three years. In other words, the Judge considered some of the claims to be stale by virtue of the restriction imposed by the aforesaid provision. He therefore capped the claims for underpayment of salaries and non-payment of pay in lieu of annual leave to three years. On that basis therefore, he declined to award kshs.16,090,500.40/- initially claimed by the appellants.

Flowing from the foregoing, the appellants now fault the decision of the trial Judge on three grounds:- that notwithstanding, the provisions of **Section 90** of the Employment Act which recognize continuing injury, the learned Judge erred in limiting the award on underpayment to only three years prior to termination of employment; that by dint of the same provision, the learned Judge erred by failing to award the appellants the accrued leave days for the entire duration of their employment; and that the learned Judge erred in failing to award severance pay despite having found that the appellants' termination amounted to redundancy.

With leave of Court, parties filed written submissions and thereafter the appeal was fixed for oral highlights. Though the respondent's counsel was absent at the highlighting of the written submissions, the respondent's case can easily be discerned from the submissions it filed as aforesaid.

Presenting the appellants' case, **Mr. Nyasimi**, learned counsel framed his arguments around three issues. One, that since the appellants were underpaid and they never proceeded on leave, the Judge ought to have recognized this as a continuing injury within the meaning of **Section 90** of the Employment Act and awarded compensation in this regard for the entire duration of their employment. Secondly, that since the Judge had found the termination of the appellants to have been on account of redundancy, he erred in failing to award severance pay in respect thereof and thirdly, that in the totality of the foregoing, the Judge ought to have found that there was violation of the appellants' constitutional rights.

On its part, the respondent contended that the appellants' assertion pertaining to infringement of their constitutional rights was a new issue that could not be canvassed in this appeal. It was the respondent's position that in an adversarial system, parties are bound by their pleadings and in this regard, the respondent relied on the decision in the case of **IEBC v Stephen Mutinda & 3 others [2014] eKLR**. On the issue of redundancy and severance pay, the respondent submitted that a party cannot pursue damages for unfair termination as well as severance pay on account of redundancy in the same claim, as these were two separate and distinct causes of action.

Traditionally, appeals to this Court from the Employment and Labour Relations Court were limited to issues of law only. Indeed, **Section 17** since repealed, of the Industrial Court Act No. 20 of 2011 provided that:-

“(1) Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.

2. An appeal from a judgment, award, decision, decree or order of the Court shall lie only on matters of law.” (emphasis added).

However, these provisions have since been amended by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2014 which repealed **Section 17(2)** aforesaid. The import of this is that the jurisdiction of this Court in appeals from Employment and Labour Relations Court now extends to issues of both law and fact.

Such being the case, this Court is bound to re-analyze and re-evaluate the evidence adduced in the trial court in a bid to reach its own findings and conclusions. In doing so, however, it should be alive to the fact that it should only interfere with the findings of the trial court when the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching the findings. See **Mwanasokoni v Kenya Bus Services [1985] KLR 931**.

According to the appellants' memorandum of claim, the relief sought by the appellants was compensation stemming from unfair termination of their employment. Under the claim, the appellants also peripherally alleged that the respondent had purported to declare them redundant.

Their cause of action therefore centred on damages for unlawful termination. On its part, the respondent never pleaded that the termination was on account of redundancy. To the contrary, it categorically stated that the appellants were never declared redundant but had left employment on their own volition having failed to blackmail the respondent into abandoning its mission to install machines to do the appellants' work and to increase their pay.

In cases where an employee sues for unfair termination, the onus is upon him to prove that the termination was unfair and upon the employer to prove that it was fair, legal, procedural and or necessary. Where the dismissal is on account of redundancy, it is for the employer to plead and lead evidence showing this as the reason and that the elaborate procedure laid down in the Employment Act on redundancy was strictly adhered to. Where redundancy was not pleaded and the employee manages to prove the termination to have been unfair, the court will readily disregard the redundancy whether or not it existed and instead award compensation for unfair termination (see **Midland Foot Centre Ltd v Richmond & Another [1973] 2 ALL ER 294**.) Indeed, both **Sections 2** and **45** of Employment and Labour Relations Act define “redundancy” thus:

“The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment.”

While **Section 45** of the Employment Act stipulates that:-

“(1)

- (2) A termination of employment by an employer is unfair if the employer fails to prove-
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

It therefore follows, that redundancy could not form the basis for an award as the appellants had only pleaded unfair termination for which they were duly compensated. The loss awarded to an unfairly dismissed employee is that which the employee has sustained as a consequence of the unfair dismissal. That which he would have received had he not been unfairly terminated. It is in line with this that where redundancy is pleaded or relied upon by the employer, the court focuses on whether or not due procedure pertaining to redundancy was followed in a bid to determine whether the dismissal was wrongful or unlawful.

This was not the case here, since the employer never sought to rely on redundancy as a reason for the termination of employment, and with good reason given that it had not followed the strict statutory provisions and procedure on redundancy. The Judge in his wisdom compensated the appellants on account of unfair termination and not both. Had he taken the latter course, it would have amounted to double compensation which is not permissible. Accordingly, we take the view that the finding of the court cannot be faulted, more so bearing in mind that both the court and the parties are bound by the pleadings. (See **IEBC v Stephen Mutinda Mula & 3 others** (supra)).

The appellants have also faulted the learned Judge for having found that part of their claim was time barred under **Section 90** of the Employment Act despite the fact that their underpayment and accrued leave constituted continuing injury within the meaning of that section.

Generally, the limitation period on actions founded on contract is six (6) years from the date when the cause of action accrued (see **Section 4(1)** of the Limitations of Actions Act). However, with regard to contracts of service, **Section 90** of the Employment Act provides as follows:-

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”

The appellants contend that underpayment of wages and accrued leave days constituted continuing injury, a contention refuted by the respondent.

According to the Black’s Law Dictionary, continuing injury is defined as:-

“An injury that is still in the process of being committed. An example is the constant smoke or noise of a factory.” (emphasis added).

This definition connotes an injury that continues to happen at the time the claim is lodged and/or ongoing. In the context of an employment relationship, it presumes that the parties are still on a continuous engagement at the time of claim. What comes to mind is where for example, the dispute pertains to an industrial strike and one of the parties has moved court on account of an injury that continues to be suffered during the subsistence of the employment and /or strike. However, in this case, it is not in

dispute that at the time the claim was lodged, the employment relationship had already been severed. Indeed, it is the termination that gave rise to the course of action. Any claims arising therefrom could therefore no longer be termed as continuing injury. That said, we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of **Section 90** of the Employment Act was never placed or canvassed before the trial court for determination. The jurisdiction of an appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is exactly what the appellants have sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury.

The case of **Ntjebe & others v Lesotho Highlands Authority Case No. LAC/CIV/A/17/2009** at the Labour Appeals Court in Lesotho, upon which the appellants have heavily relied, is distinguishable from the present case in several respects. Firstly, the Lesotho statute allowed the filing of time barred claims provided good cause was shown. Secondly, the issue for determination in that suit was whether the respondent could raise novel issues on appeal which issues he had failed to raise at the trial court. The crux of that appeal was the stage at which issues for determination ought to be raised. It was not whether or not courts should be flexible in discerning limitation laws as submitted by counsel. In the result, the contention by the appellants that the authority supports their contentions herein is with respect, erroneous.

Again, the appellants have gone to great lengths in their determination to show that the dispute raises issues of constitutional nature. That the dispute turns on **Article 41** of our Constitution that recognizes fair labour practices. That what appellants were subjected to were unfair labour practices. That being the case, the appellants were of the view that being a constitutional violation, the same should not be subjected to the rigours of limitations of time. That a claim that a constitutional right has been violated can never be barred by limitation of time clauses.

Once more we need to reiterate that the initial dispute presented before the trial court had no constitutional underpinning. The claim as filed was a simple claim for wrongful and unlawful termination of employment. It did not allege a violation of any constitutional rights of the appellants. We do not think therefore that it would be right for the appellants to change tact in this Court and purport to anchor their claim on an alleged violation of their constitutional rights. It is too late in the day. As it has constantly been stated time without number, parties are bound by their pleadings. Parties are not allowed to switch goal posts of litigation as and when they want. The appellants were at liberty to present a constitutional petition before the trial court but elected not to do so. Again, the appellants could when presenting their case in the trial court have easily brought up the constitutional concerns for determination but opted not to do so. To wind up on this aspect of the matter, we can do no better than reiterate what the Supreme Court said in the case of **Erad Suppliers & General Contractors Limited v National Cereals & Produce Board, SC. Petition No. 5 of 2012:-**

“...In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court...”

We may on our part go further and even add first appellate court.

Given what we have said, there can only be one result in this appeal- dismissal. The appeal is dismissed with costs to the respondent.

Dated and delivered at Malindi this 30th day of October, 2015.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR